No. 4568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GIUSEPPI CAMPANELLI,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT.

Plaintiff in error, Giuseppi Campanelli, prosecutes a writ of error to the District Court of the Northern District of California to reverse his sentence rendered upon his conviction of the crime of conspiracy under Section 37 of the Criminal Code of the United States.

On November 12, 1924, an indictment was presented against plaintiff in error and twenty-three other persons named, charging them with the crime of conspiracy in that at the Bay of San Francisco, within the District and Division aforesaid, and within the jurisdiction of that court, they did, on the 1st

day of February, 1924, unlawfully, feloniously and knowingly conspire among themselves and with others unknown to commit offenses against the United States; that is to say,

> "(a) Wilfully, unlawfully, feloniously and knowingly to sell, transport, import, deliver, furnish and possess in the United States intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer containing one-half of one per centum and more of alcohol by volume and fit for use and intended for use for beverage purposes in the United States and within the jurisdiction of this court the said Acts to be then and there unlawful and prohibited and contrary to the provisions of the Act of October 28, 1919, known as the 'National Prohibition Act' and intended for use for beverage purposes in violation of said Act.
>
> (b) Wilfully, unlawfully, feloniously, knowingly and fraudulently import and bring into the United States and within the jurisdiction of this court, assist in importing and bringing into the United States and within the jurisdiction of this court merchandise contrary to law, to wit, whiskey, champagne, wine, gin and beer containing one-half of one per centum and more of alcohol by volume and fit for use and intended for use for beverage purposes within the United States, the said acts to be then and there unlawful and prohibited and contrary to the provisions of Section 593, Subdivision (b) of the Tariff Act of 1922 and intended to be imported and brought into the said United States in violation of said Act."

It was alleged that the said parties conspired with divers other persons whose names were to the Grand Jurors unknown, and it is charged that the conspiracy

was in effect continuously throughout all of the time and from and after about February 1, 1924, up to the filing of the indictment and particularly at the time of the commission of overt acts set forth.

As overt acts in aid of the conspiracy it was charged:

(a) that the defendants and each of them did at Havana, Cuba, in July, 1924, cause the Steamer "Giulia" to be loaded with about 12,000 cases of intoxicating liquor specified, and that on the 7th of July, they caused the steamer to leave the Port of Havana, Cuba, and proceed to a point opposite and within a distance of less than thirty miles from the Farallone Islands, with a purpose and intent of introducing the liquor into the United States, and that they furnished and delivered from said vessel at said last mentioned point a portion of the cargo of intoxicating liquors to and upon the Motorboat "Gnat" and divers other motorboats whose names and masters were to the Grand Jury unknown, well knowing that the motorboat would deliver, import and bring into the United States, to wit, San Francisco Bay, said cargo;

(b) that the defendants and each of them on September 1, 1924, and while the Steamer "Giulia" was at anchor opposite the Farallone Islands, did load upon, deliver and furnish to the motorboat "Gnat" from the Steamer "Giulia" 300 cases of whiskey, and that the defendants did thereupon cause said liquor to be transported and caused to be brought

into the United States and into San Francsico Bay and within the jurisdiction of the court on the motorboat "Gnat".

(c) that the defendants and each of them, between September 8, 1924, and October 8, 1924, while the said Steamer "Giulia" was at anchor as aforesaid, loaded upon, delivered and furnished to the motorboat "Shark" and the motorboat "Gnat" 3000 cases of specified intoxicating liquor, and that the said defendants and each of them during said time by means of said motorboats, transported, imported and brought into the United States, into San Francisco Bay, and within the jurisdiction of the court said intoxicating liquor.

Certain of the defendants were not apprehended or brought to trial; a number, who constituted the crew of the Steamer "Giulia" were acquitted; the defendant John De Maria, was also acquitted, while the master of the "Giulia", J. O'Hagan, was convicted, and plaintiff in error, Giuseppi Campanelli, was convicted and upon such conviction sentenced to be imprisoned for two years in the United States Penitentiary and to pay a fine of $500.

There is a bill of exceptions in the record of some volume. Although it includes a number of papers not necessary to be so included (R. 268), we are unable to find therein any statement that it includes all of the evidence submitted at the trial, nor is there any stipulation or reference to the written exhibits,

being therein included or sent to this court, with few exceptions.

Although the argument of plaintiff in error involves a consideration of the case made against him, we do not find in his brief any *statement* of the evidence, except a meager reference to a portion of it on pages 3 and 4 of his brief. Accordingly, we are constrained to submit a statement of the evidence of the case, and we shall attempt the plan of summarizing it rather than in setting forth *in extenso* in the words of the witness. Such summary, of course, need not include matters affecting other defendants only; it need only go far enough to show an agreement or combination between two or more of the charged defendants, including plaintiff in error, to "import", "possess", "transport", "deliver", and "sell" within the United States intoxicating liquor.

In the spring of 1923 defendant David Henderson and defendant Guyvan McMillan were acquainted and associated together appearing frequently at the office of the Columbo Mining Company (R. 49). These parties were two of the main conspirators in the combination under review. They were acquainted and associating with one Manning. Manning made plaintiff in error Campanelli acquainted with Henderson (R. 148), and Henderson made Campanelli acquainted with McMillan (R. 149). At Henderson's invitation Campanelli visited him at the Stanford Court Apartments (R. 148). This introduction was in the spring of 1923 at the mine syndicate office at 625

Market Street (R. 159). McMillan acted as a sort of confidential agent or representative of Henderson. Upon being invited to Henderson's apartments, plaintiff in error got better acquainted with him (R. 159), and thereupon entered into an arrangement whereby Henderson entrusted him with sums of money and he was to receive an award for each and every case delivered from these certain ships, the *"Ardenza"* and the *"Frontiersman"*, whether he, Campanelli, took part in the sales or not; that his principal duty was to appear at the point of delivery, collect the money due in payment for the liquor, and sometimes at Henderson's suggestion he deposited such money to his own bank account, at other times he would proceed to the Stanford Court Apartments or to his own office and make settlements with Henderson as the result of these liquor sales (R. 160). As a part of this arrangement Campanelli had with Henderson he was to receive so much for each and every case delivered by the Henderson interests in California or in San Francisco, and that his principal duty in that connection was to keep in contact with the shore boats that went out to the ship to get the liquor and then to be at the point of delivery when a cargo was delivered at any particular residence. He would accompany the truck that made the delivery and then he would collect from the purchaser and he deposited these funds in the bank or gave them direct to Mr. Henderson, either way. Sometimes he said he carried large amounts of money for Henderson for days at a time and then Henderson would arrange with him,

every so often, to figure out how much was due as the result of the quantity unloaded on the ship *"Ardenza"*, as well as the *"Frontiersman"* and the *"Giulia"*. However, as far as the *"Giulia"* was concerned, only two boat loads had been delivered prior to the time the boat was sunk and that Campanelli received his commission from these two deliveries (R. 155). On one occasion described as twenty days or more after leaving Havana, hereinafter referred to, Campanelli, being in his own office at 17 Columbus Avenue, in this city, received a call from Henderson in the city, asking him to join the latter at the Clift Hotel on Geary Street. At that time Henderson told Campanelli there were about 8500 cases of liquor aboard the "Giulia" and assistance was desired in the matter of the disposition of the cargo. Henderson offered to pay him a dollar a case as commission for such assistance, as he had rendered or might render in the future (R. 161). Henderson told Campanelli that one Alioto, foreman for the Booth Fishing Company at San Francisco, who had assisted in unloading liquors on a previous occasion would help him in transferring cargoes from the "Giulia" to points along the shore and Campanelli was requested to get in touch with Alioto to arrange certain details with him, and that he was authorized to tell Alioto that it was Henderson's purpose to pay him at the rate of $2.50 for each case of liquor unloaded from the "Giulia"; that Alioto agreed to do the work and Campanelli informed him of the date when Hender-

son expected that the boat would arrive off the coast, the boat "Giulia" (R. 162).

The foregoing matters were derived from the testimony of Special Agent Oftedal as to conversations had with Campanelli in November and December, 1924.

In April or May, 1924, defendant Campanelli and McMillan conducted negotiations resulting in the sale to McMillan of the ship *"Frontiersman"*, owned by four persons named. The first payment of $300 was paid by McMillan March 12, 1924; the second payment of $500 was made by Western Union Money Order March 13th; the third payment was a check for $4500 on a San Francisco bank dated March 21, signed G. Campanelli; the fourth was $5000 on a San Francisco bank, signed Campanelli. McMillan negotiated the purchase; he was present in the room when the $4500 signed by Campanelli was made out and also the $5000. The owners assigned their interest in the boat to McMillan and Campanelli—a joint assignment. Negotiations for the purchase of the vessel began March 12, 1924, and the deal was consummated April 17, 1924 (R. 119). The name of the steamer so purchased was subsequently altered from "Frontiersman" to "Giulia" (R. 86).

The exhibits apparently pertaining to this vessel, some of them introduced by the defendant Campanelli (R. 205, 206), are not in the record, nor sent up as exhibits with, perhaps, the single exceptions of the certificate of registry (R. 86, 87), and the manifest (R. 73).

Defendant O'Hagan testified that he was a ship master; that before April, 1924, he had been working for the Associated Oil Company, then left San Pedro and came to San Francisco, inquired of the British Consulate if there were any British ships in port requiring a master and he was referred by the consul to McMillan, who recently purchased a ship. He went to the address given him, 17 Columbus Avenue, and there met McMillan who told him he intended to send a cargo of canned goods from San Francisco to Havana; that his ship was at the Los Angeles Dry Dock and he asked Captain O'Hagan to go down and inspect the vessel. On April 29th witness left and went to Los Angeles; McMillan arrived ten or eleven days afterwards. Repairs were then being made. McMillan hired the crew and brought them to Los Angeles. The ship was called the "Giulia". The vessel left Los Angeles Harbor May 24th, went to Panama City for the purpose of procuring a provisional Panamanian Registry. It would have taken several months to procure British Registry; for that reason it was registered under the flag of Panama with McMillan appearing as owner. Witness identifies the document offered in evidence as the registration of the ship under the Panamanian flag. The vessel proceeded to Cuba where witness was advised for the first time that a cargo of liquor was to be loaded on the vessel. Witness identifies a copy of the bill of lading as to the contents of the cargo already in evidence, referring apparently to R. 75, which in turn referred to the manifest apparently set out at R. 73. Witness

stated that the following clause was inserted at his insistence:

> "Consignees will have option, weather permitting to take delivery on the high seas, but in no case and under no circumstances is delivery to be made within 20 miles of any territory, and then only on the Pacific Coast within a radius of a line drawn due west of San Diego and a line due west of Seattle, always at least 25 miles from such described coasts or territories. All island territories within this described area to be taken as the measurement point for such deliveries, if made, in order to conform with a recent treaty made between Great Britain and the United States of America. Also, should the maximum speed of any vessel taking delivery be more than 15 knots per hour, such excess speed must be added to the delivery distance from the within described area."

Thereupon witness with the vessel sailed from Havana to Vancouver, British Columbia, as destination but was told in Havana that a supercargo on board would give definite instructions at Mazatlan. Owing to a fire in the vessel at Mazatlan and bad weather up the coast, there was delay so that when the ship arrived about thirty miles west of Half Moon Bay the coal was exhausted and food running short. Witness was compelled to run back under sail to Ensenada, on the way hailing a small boat. He sent a cablegram to Mr. McMillan, 17 Columbus Avenue, he being the only man recognized as owner and his name appearing on the documents in witness' possession as owner. The cable was sent from Ensenada by the purser and Campanelli arrived in

Ensenada. Negotiations were had and witness received about 700 sacks of coal from the Steamer "Gryme", just sufficient to get back to the Farallones. When witness arrived no boat was evident but eventually witness received thirty or forty sacks of coal. He made delivery of cargo on the high seas to two boats. The first boat that came along side delivered coal, witness doesn't recall whether it took up liquor. The purser or supercargo left the boat as soon as the coal was delivered and returned on the boat that brought out the coal. Subsequently coal was received from a boat—the "Shark"—in the vicinity of Point Reyes (R. 234). This was within the limits of the United States (R. 243). After so coaling witness proceeded to a point 25 or 30 miles west of the Farallones. That was the last coal received. Some water was received from the "Shark" and a small quantity of provisions, about twenty-five or six days before abandoning the ship. On October 24, 1924, witness abandoned the ship, his coal was gone, it was about six weeks after receiving coal from the "Shark", had no provisions, water was muddy and dirty, had no physician or doctor, crew wanted to abandon ship earlier. The ship had drifted and finally was abandoned nineteen miles west of Point Esteros (R. 236). The seacocks were opened and the vessel sunk to avoid being a menace to navigation. Five hours later the party, including witness and crew, were picked up by the Steamer "Brookings" and brought into San Francisco. Witness was employed by McMillan at a salary of $240 a month.

Had not been paid. On cross-examination witness said he met McMillan at 17 Columbus Avenue, met Campanelli at the same address in McMillan's Company. Campanelli did not give witness the impression that he had any interest in the ship but was merely acting under instructions from McMillan. Campanelli and McMillan appeared in Los Angeles when witness went to look at the boat. Campanelli left before we sailed; McMillan remained there until we sailed. When witness got to Havana he saw Henderson and Campanelli. McMillan was not there. McMillan told witness he was to take instructions from Campanelli. When witness saw Henderson he was in absolute charge of the loading. Campanelli informed me that Henderson was the boss (R. 241). Campanelli remained at Havana until after the ship left (R. 243). Saw Campanelli at Ensenada (R. 243). He came back with us on the boat to San Francisco. The first vessel brought out the coal. No coal came later. Gervaudo (the supercargo) left on the first boat; Campanelli left also. About six or seven loads of cargo were removed from the vessel under Henderson's instructions. Henderson came out there and remained on board for a time. Witness had aboard four rifles, a quantity of revolvers and a machine gun. McMillan sent them down to the vessel before we left San Pedro. They were eventually thrown overboard (R. 244). I followed the direction of Henderson at Havana because Campanelli told me he was the boss (R. 245).

Continuing as to Campanelli's statement, he said (R. 160):

That early in the year 1924, Henderson informed him of his plans for making a trip to Havana, Cuba, for the purpose of obtaining some liquor. He was advised of the fact that the Steamer "Giulia", would make the trip to Havana for the purpose of loading up liquor to bring around to California. That they started on the trip in the month of April, 1924, Campanelli went along on the train in the company of Henderson and De Maria. The parties spent a week in Miami and then proceeded to Havana via Steamer "Key West", Campanelli stayed in Havana for fifteen or twenty days. During that time he had frequent visits with Henderson who showed him certain warehouses there in which Henderson kept a supply of liquor that had been transferred from Scotland. That while there the "Giulia" arrived. Campanelli helped Henderson in loading the ship with about 8400 cases of intoxicating liquor from the warehouse on San Francisco Pier. De Maria did not remain in Havana very long, perhaps, a week. Campanelli stayed in Havana until the "Giulia" had loaded then proceeded to New Orleans; then returned to San Francisco by rail and about twenty days or more after leaving Havana, Campanelli, at his own office, 17 Columbus Avenue, in this city, received a telephone call from Henderson asking him to join the latter at the Clift Hotel. Meeting him he was told there was about 8500 cases of liquor upon the "Giulia" and assistance was desired as above stated

(R. 161). About a week later Henderson informed Campanelli that the "Giulia" was down at Ensenada in need of coal and provisions and requesting that he go down there and help supply the ship. Campanelli went to Ensenada and assisted (R. 162). Campanelli saw there the captain and supercargo Girvando (R. 163). A few days later the "Giulia" started on the voyage north, Campanelli aboard her. About thirty miles south of the Farallones he was permitted to go aboard in the first boat that came along side, he doesn't know the name, as far as he knows the launch did not remove any liquor. Arriving aboard he went to his own office on Columbus Avenue and found Henderson awaiting who told him that a load of liquor consisting of about 300 cases had been brought ashore from the "Giulia". At Henderson's direction Campanelli made one trip out to the "Giulia" by means of the launch "Gnat", transferring some provisions to the ship. Guyvan McMillan arranged for supplying the "Giulia" with coal. No liquor was brought in on the "Gnat" while Campanelli was aboard on the first trip. He later learned from Henderson that three loads of liquor were removed from the "Giulia" by means of the "Gnat" which was operated by Alioto. Campanelli states that he did not take part in the removing of any liquor from the "Giulia" nor in the disposition of it about the city (R. 164).

Henderson disappeared promptly after press office story of the sinking of the "Giulia" and the arrested crew (R. 164).

Ignacio Alioto testified that he knew defendant Campanelli; saw him September 13th or 14th, 1924; conversed with him. On the 8th or 10th of September, Campanelli hired witness' boat called the "Gnat" to bring provisions to a big boat outside. Nothing was said about bringing in liquor. A few days afterwards witness found that they had used the boat to bring in liquor and witness told him to use it for liquor. Witness never went out on the boat but received $2500 on account of bringing in liquor, was supposed to receive $3 a case. He received money from Campanelli but he still owes witness $2000 (R. 121). $2500 in money witness received he gave to men on the boat. That is, witness paid the two men $1600 of the $2500 received and kept the balance (R. 124).

Pablo Herman testified that he was the captain of the "Gnat" in September, 1924, working for Alioto, witness who just left the stand. I took some provisions out on the boat about two hours outside the Farallones to a boat called the "Giulia" and saw Captain O'Hagan of the "Giulia". I also took 150 sacks of coal out to the "Giulia" at approximately the same time and place. Witness brought liquor in three times; between 400 or 500 cases each load. Had a deck hand with him. Campanelli went out on the first trip (R. 124).

Witness Salvatore Alioto was a fisherman. In September, 1924, he was working for Ignacio Alioto on the "Gnat". Went with Captain Herman along side the "Giulia" west of Noonday Rock, along side

the Farallones. Witness knew defendant Campanelli; met him aboard the "Giulia". Campanelli went out on the "Gnat" but did not come back; was left on the "Giulia". Witness brought back whiskey from the "Giulia"; on three trips brought whiskey. Alioto paid witness to bring liquor in—$1500 (R. 128).

Frank Landl was working on a small boat—Number 3569. Went out to the "Giulia" near Noonday Rock. Recognized Captain O'Hagan as being the captain of the boat. Witness was paid by one Lenhart. Witness brought back a load of liquor from the "Giulia", approximately about four loads with 300 cases to the load. On one occasion witness saw defendant Campanelli on the "Giulia". Part of the liquor was landed on Lanatong Bay and the rest above Pt. Bonita. Witness saw Henderson. He made a trip with witness to the "Giulia" (R. 133, 134).

M. G. Sturdevant testified that in September, 1924, he was master of the motorboat "Shark". On the 15th of September, 1924, he took 75 tons of coal out to the boat "Giulia" in the motorboat "Shark". The "Giulia" was near Cordell Banks. Did not deliver the coal to the "Giulia" because it was too rough. They came into Drakes Bay. Witness delivered coal to the "Giulia" approximately a mile from shore, but the point runs down. He might have been between five or six yards from Pt. Reyes. The coal was obtained in Oakland. No liquor was brought in. Witness received full payment with the exception of $78. He is not sure whether he received the money from

Adolph or Mac. Witness went up to 15 or 17 Columbus Avenue with reference to the payment (R. 125, 126).

It is further shown by witnesses THOMPSON (R. 127), BEERMAKER (R. 134), and RICHARDSON (R. 135), that coal was delivered on the "Gryme" to the "Guilia" at Ensenada in September, 1924. The coal being arranged for with witnesses by De Maria, was taken from San Diego to Ensenada.

It was further shown that coal was sold and delivered to the Steamer "Mae Heyman" December 5, 1923 purchased by defendants McMillan and Henderson (R. 136, et seq. and R. 52). It was delivered to that vessel. It was further shown that on April 10, 1924, the "Mae Heyman" was seized at the end of the 16th Street Pier in this city while unloading cargo of 1705 cases of liquor and the men arrested (R. 47). It was in pint bottles with a heavy wrapper around it and then in regular sacks sewed tight on the end just like smuggled Scotch would come in, the same way (R. 48).

Witness COMPANA, manager of the Broadway and Grant Office of the Mercantile Trust Company, produced the bank statement of the plaintiff in error covering a period from July 21, 1923, to August 28, 1924 (R. 195). It was a complete record "of the man's account at the bank from the date it was opened to the date it was closed" (R. 196). It was put in evidence and showed a total of deposits of $157,-611.02. It was admitted as U. S. Ex. "10" but does

not further appear in the record. Witness is the manager. He knew the account was there and checked up the checks that came in and out (R. 197). Everything in the bank is directly under witness' supervision and the books are kept under him (R. 199). And defendant O'Hagan testifying completely corroborated the greater portion of the government's case. He freely admitted being employed by Henderson taking the ship "Giulia" from Los Angeles through the Canal to Havana, its loading with the liquors under the bill of lading containing the ambiguous clause hereinabove set forth, his seeing Campanelli at Havana, as well as subsequently at Ensenada, the arrival of the "Giulia" opposite San Francisco and delivery of liquor to small boats (R. 234). He admitted taking coal from the "Shark" within the territorial waters of the United States (R. 243). He further testified to the activities of Campanelli at Havana and Ensenada and to his travelling on the ship from Ensenada to a point off the Heads (R. 243).

The specifications of error are eleven in number and set forth:

(1) That there was a material variance between the indictment and the evidence;

(2) That the court erred in admitting evidence; and

(3) That the court erred in refusing to give certain instructions requested by plaintiff in error.

In the argument of counsel eight propositions are advanced in separate sections of his brief:

(1) That there is a variance between the indictment and the evidence;

(2) That the court erred in admitting evidence relating to the ship "Ardenza";

(3) That the court erred in admitting evidence in respect of the boat "Mae Heyman";

(4) That the court erred in receiving in evidence the bank account of plaintiff in error;

(5) That the court erred in admitting in evidence certain papers taken from the possession of defendant O'Hagan;

(6) That the court erred in admitting the statement of defendants Daniel and Rodney;

(7) That the court erred in refusing a requested instruction upon circumstantial evidence, and

(8) That the court erred in refusing to give certain instructions in regard to the confession of plaintiff in error.

ARGUMENT.

I.

THERE WAS NO VARIANCE BETWEEN THE PLEADING AND THE PROOFS, THE VENUE WAS PROVEN.

It is contended that there was a variance between the allegations of the indictment and the testimony

in support thereof in this, that it was charged that the conspiracy was formed in San Francisco Bay, and that as a matter of fact there was no testimony relating to any occurrence therein, except to the arrest of O'Hagan and the crew of the "Giulia", and it is argued that accordingly the venue was not proven. It is sufficient to refer to the record.

It would seem that counsel misapprehends or overlooks the record in this regard: For there has rarely been a case where the proofs on the part of the government were so conclusive as to this particular feature. To afford the necessary proof of the venue of the crime it would have been necessary for the government to prove only that the formation of the conspiracy was within the jurisdiction, or that any alleged overt act was committed within the jurisdiction.

Hyde v. U. S., 255 U. S. 347; 56 L. ed. 1114.

Here the government did both; it did more; to an unusual degree it was able to prove by direct rather than circumstantial evidence the actual formation of the conspiracy—the actual "breathing together"; for it was shown that conspirator Henderson and conspirator McMillan were closely associated (R. 49, 159); it was further shown that certain of Henderson's activities were carried on at the office of the Columbo Bullion Mine Syndicate at 625 Market Street in this City; that Henderson met plaintiff in error at the Stanford Court Apartments in this city and there agreed with him as set forth, that is to say, Hender-

son intrusted him with sums of money and Campanelli was to receive a dollar for each and every case of liquor delivered from certain ships specified, being the "Ardenza" and the "Frontiersman", and that his duty was to appear at the point of delivery, collect the money due for the liquor and either deposit the same to his own bank account or at the Stanford Court Apartments make settlement with Henderson (R. 160). It was further shown that at the request of Henderson in San Francisco, Campanelli arranged with one Alioto of San Francisco to help in transferring cargoes from the "Giulia" to points along the shore (R. 162). This alone would have been the actual formation of the conspiracy. Further, it was shown that pursuant to such request Campanelli actually arranged with Alioto to transfer liquor from the "Giulia" to the shore in the "Gnat" (R. 121), and that pursuant to such arrangement the witnesses Herman and Salvatore Alioto actually brought liquor from the "Giulia" in the "Gnat" to shore (R. 128), the liquor being landed in South San Francisco (R. 125), Campanelli accompanying on some of the trips. It was further shown that witness Sturdevant assisted in coaling the "Giulia" on the 15th of September, 1925, in Drakes Bay from 500 yards to a mile from the shore and within the limits of the United States and within this district (R. 126). Witness Landl brought ashore a cargo of the liquor (R. 134). The transactions referred to in which the motorboat "Gnat" was considered were charged as one of the overt acts (R. 10).

There can be no question but that the venue of the conspiracy was conclusively proven.

II.

THE COURT DID NOT ERR IN ADMITTING EVIDENCE RELATING TO THE SHIP "ARDENZA", OR RELATING TO THE DEFENDANT HENDERSON.

The conspiracy charged here was a general conspiracy and the testimony clearly established such a conspiracy. The main conspirators, Henderson, McMillan and Campanelli, while affording the element of unity to the conspiracy were wholly unconcerned as to what agencies or means would be used; they were indifferent as to what motorboat owners would be brought in to make shore connections. It would be immaterial to them where they obtained the liquor or by what ships it was brought to the Farallone Islands. Accordingly the government properly charged a general conspiracy as distinguished from a particular conspiracy.

Dealy v. U. S., 152 U. S. 539; 38 L. Ed. 545.

If it were otherwise, the greater the conspiracy, the more difficult it would be for the government to punish it. All of the matters proven in the case at bar were of the character of overt acts in the conspiracy so described. They even coincided in time and place with the description. The conspirators, as far as the government could show, made use of two seagoing vessels in order to bring the liquors off the Heads—the

"Ardenza" and the ship called first the "Frontiersman" and subsequently the "Giulia". The necessary unity between the two ships was clearly shown in the statement of Campanelli. Besides being ships bringing intoxicating liquors off San Francisco for introduction ashore, and bringing them at the time specified in the indictment, the ships were grouped together in the undertaking between Henderson and plaintiff in error in that he was to receive a dollar for each and every case delivered from these certain ships—the *"Ardenza" and the "Frontiersman"* (R. 155, 160). Under such understanding the proceeds were to be collected by Campanelli and generally banked in his own account (R. 155, 160). He had such an account in the Mercantile Trust Company covering the period from July 21, 1923 to August 28, 1924, aggregating a large amount, $157,611.02. Since the exhibit is not brought into the record by plaintiff in error it will not be clear to this court what further features were in the account. The situation thus presented was similar to that found in the "Quadra" case. It was contended that while proof of the activities of the *"Quadra"* might not have been proper, it was not proper to prove what was done with respect to the Steamer *"Norburn"*; but it was pointed out that the contract of Quartararo with another to bring the liquor ashore embraced both ships and thus afforded the necessary connection, the court saying that the matter was not governed by the two authorities cited.

Ford v. U. S., 10 Fed. (2d) 339, 348.

The following excerpt illustrates the view of this court:

> "It is contended that there was error in receiving the testimony of Sam Crivello about the liquor secured by him from the Norburn about the 1st of May, 1924, and delivered to Quartararo at Oakland creek. It is argued that this incident bore no relation to the conspiracy involved in the present prosecution. Plaintiffs in error cite Terry v. U. S. (C. C. A.), 7 F. (2d) 28, and Crowley v. U. S. (C. C. A.) 8 F. (2d) 118). These cases hold, that, in a prosecution for conspiracy, the government's evidence must be confined to proof of the conspiracy charged, and the Terry case holds that 'the scope of the conspiracy must be gathered from the testimony'. Within these rules we think the testimony as to the Norburn incident was admissible. The government explicitly proved that, prior to Crivello's reception of liquor from the Norburn, he had been employed by Quartararo to receive and transport liquor from various vessels and to deliver it to Quartararo at Oakland creek. Here was clear proof of a conspiracy between these two defendants, within the allegations of the indictment."

And in the case of

Marron v. U. S., 10 Fed. (2d) 251,

the same contention was made upon the same authorities. There it appeared that the greater portion of the proof on the part of the prosecution concerned the business carried on by the parties at 1249 Polk Street, San Francisco. Testimony was received, however, as to the storage of a considerable quantity of liquor by Marron only at another point, at 2031

Steiner Street. Liquor was seized at this point under a proper warrant and the only question raised was as to the relevancy of this evidence as to the conspiracy. The court said,

> "It was the contention of the government that, shortly after the date of this seizure, Marron made arrangements with the defendant Brandt to cooperate with him in running the establishment at 1249 Polk Street. *The fact that Marron was well stocked with liquor at this time was a circumstance which the jury had a right to consider.*"

It thus appears that as in the *Ford* case and in the *Marron* case, there was the necessary connection shown between the two lines of proof to couple them together in the same conspiracy. Manifestly they were in some conspiracy and, being so coupled together, it cannot be held that it was the case of two independent conspiracies within the same general description. While on the other hand, in the *Terry* case, the theory proceeded on was that some of the defendants might have been convicted of one conspiracy and some of another, although the two conspiracies were entirely different; or that certain groups of persons were cooperating without any privity, each with the other and not towards the common end, toward separate ends.

And in the *Crowley* case it was said that

> "In order to make such evidence admissible there must be such a showing of *connection* between the different transactions as raises a fair inference of a common motive in each."

Here the necessary connection was shown in that the undertaking of Campanelli with Henderson embraced within its very terms both ships and contemplated moving the liquor from them by shore boats to be employed and supervised by Campanelli. The case is thus seen to be governed not by the *Terry* or *Crowley* cases but by the *Marron* and *Ford* cases.

III.

THE COURT DID NOT ERR IN RECEIVING TESTIMONY RELATIVE TO THE BOAT "MAE HEYMAN".

Certain evidence was submitted tending to show the purchase of coal for the "Mae Heyman" by the co-conspirator McMillan in December, 1923, and its delivery to that boat. This testimony was relevant to show that McMillan was the owner and operator of that boat at that time. It would have had no other effect and would have been proper evidence to prove such possession or operation. No other activity of the boat was shown in that month. As to this element of the proof, we submit that no question could be made as to the receipt of the evidence upon that issue, if the boat itself was subsequently connected with the case.

Later, on April 10, 1924, the boat "Mae Heyman" was seized by Prohibition Agents at 16th Street Pier in San Francisco at about 10:30 P. M. at a time when the operators were endeavoring to unload ashore the boat's cargo of liquor consisting of 1705 cases of

liquor (R. 47), described as in pint bottles with a heavy wrapper around and then in regular sacks sewed tight in the ends just like smuggled scotch would come in. This was within the period charged as the time during which the conspiracy was effective; it was within the time during which Campanelli maintained the bank account properly brought into the consideration of the case as hereinafter set forth. It was within the allegations of the indictment; it was at a time when the "Ardenza" with its cargo of liquor owned by Henderson was hovering outside the Heads, endeavoring to introduce the liquor ashore (R. 51). It was otherwise shown that McMillan was closely connected with Henderson (R. 159), who in turn had contracted with plaintiff in error to remove the liquor from the "Ardenza", as well as the "Giulia" at $1.00 per case (R. 155).

Accordingly, it is seen that at a time when the ship "Ardenza" in which the conspirator Henderson was interested, owning at least the cargo, was hovering outside the Heads, a boat owned and operated by Henderson's fellow conspirator with close connections was detected in attempting to smuggle ashore a large quantity of liquor, apparently smuggled, and while Campanelli was under contract to see that this very thing be done and to receive a dollar a case for its distribution. From such facts, clearly the jury was entitled to infer that the activity of the boat "Mae Heyman" was one of the means of the main conspiracy charged and proven.

Ford v. U. S., 10 Fed. (2d) 339.

IV.

THE COURT DID NOT ERR IN RECEIVING IN EVIDENCE THE BANK ACCOUNT OF PLAINTIFF IN ERROR.

There was put in evidence a bank account of plaintiff in error from the records of the Mercantile Trust Company verified by the manager thereof. The details of this account cannot be seen since the exhibit is not embraced in a bill of exceptions, but enough appeared to show that it was the bank account of Campanelli during the period referred to in the testimony and that the deposit aggregated a large amount. It would clearly be taken in *corroboration* of his statement to witness Oftedal that at Henderson's suggestion he deposited such money to his own account (R. 160). It would also show the *commission* of what would be an *overt act* by Campanelli in carrying out the conspiracy. The testimonial guaranty of trustworthiness was afforded by the statement of the manager of the branch wherein the account was kept that he knew the account was Campanelli's and that he "checks up checks that come in and out" and that everything in the bank is done under his supervision; the books are kept under him (R. 197, 199). As to the individual items, nothing can be said respecting them since Exhibit "10" is not included in the record but the fact that the total deposit aggregating a large sum was deposed to by the witness. The testimony was thus clearly relevant and produced under the proper guaranty of trustworthiness.

V.

THE COURT DID NOT ERR IN RESPECT TO THE ADMISSION OF EVIDENCE OF PAPERS TAKEN FROM THE POSSESSION OF DEFENDANT O'HAGAN.

As we have seen, O'Hagan and the crew of the "Giulia" were forced to abandon and sink that ship at sea. After a few hours they were rescued by the Steamer "Brookings", brought to the port of San Francisco and placed under restraint. The defendant O'Hagan, having indicated that he was the master of the sunken "Giulia", was examined by custom officers and found to be in possession of certain documents apparently constituting ship's papers. As the court stated (R. 58), it was understood that the papers were offered as papers that the captain surrendered to the custom officers.

Thereupon O'Hagan was examined before Custom Officer Creighton and made a statement. This statement was put in evidence against O'Hagan only; it being conceded that since it was made subsequent to the end of the conspiracy it could have bound only himself. The court clearly indicated this in its rulings (R. 69).

Subsequently, however, O'Hagan testified at length and we do not see that the statement would have added much to the case against him other than what he willingly testified to (R. 231, et seq.). In addition to this statement the receipt of which in evidence is not complained of, documents found in O'Hagan's possession were offered in evidence. As to one of

them, a certain letter apparently addressed to Campanelli, the court wholly excluded it from evidence even as against O'Hagan (R. 200). This exclusion applied to both the letter and the translation (Exhibits 5 and 6); it could not have affected the case in view of the court's specific direction (R. 201). It thus appears that the statement of Captain O'Hagan as well as the letter referred to could not have affected Campanelli.

There were, however, four exhibits put in evidence, contents of which however are not very clearly set forth. Exhibit 1 (R. 55) was apparently a receipt for packages of whiskey containing a certain statement as to the non delivery within twenty miles of the coast of the United States. The only objection to this was want of foundation. It was thought that the necessary integrity was imparted to the document from the circumstances of its origin. In any event, when Captain O'Hagan testified (R. 233) he afforded the necessary foundation by saying that his copy of the bill of lading as to the contents of cargo had already been offered in evidence, and that he insisted on the insertion of the clause referred to (R. 232). Exhibit 2 does not appear in the record unless the document set out at page 86 would be a copy; if so, it merely appears to be a registry by the authorities of Panama or a *"patente de nacionalizacion"*, but anything shown by such exhibit was freely testified to by Captain O'Hagan in reference to the registry of the "Giulia" (R. 232) and thus would have made the necessary foundation. The con-

tents of Exhibit "3" do not appear from the record (R. 59).

Exhibit "4" (R. 60) is merely described as a manifest of cargo shipped on the voyage referred to and as listing the same liquors as the other document. Its contents do not otherwise appear from the record. Testimony of Defendant O'Hagan (R. 232) substantially to the effect that Exhibit "1" was the copy of the bill of lading as to the contents of the cargo would show beyond any question what the cargo consisted of. The defendants put in evidence a copy of the bill of sale of the "Giulia" as Exhibit "F" (R. 240, ...).

The principal objection now urged in the brief of plaintiff in error to these documents or some of them, that while admitted in evidence as to O'Hagan only they would prejudice the case of the other defendants. We are unable to see how this could be so. The court clearly instructed the jury and the letter in Italian, as to which the principal complaint is made was clearly excluded from evidence for all purposes (R. 200, 201). Considering the testimony of defendant O'Hagan, there would be little or no dispute as to the matters indicated by the so-called ship's papers.

VI.

THE COURT DID NOT ERR IN ADMITTING IN EVIDENCE THE STATEMENTS OF DEFENDANTS DANIELS AND RODNEY.

Defendants Daniels and Rodney were two of the crew of the "Giulia" and with others of the crew

charged as conspirators. It was clearly shown that they were concerned in the activities of the "Giulia" here brought under review. Apparently they defended upon the theory of their ignorance or non-knowledge, such as might be attributed to mere seamen. It was proper, however, to charge them in the same indictment with the others, and it was proper to bring them on for trial at the same time. Indeed, there is no suggestion now to the contrary, nor was any application for severance made.

Such being the situation, any evidence relevant to prove the guilt of these two defendants was properly received and clearly the fact that the conspiracy may have ended would not prevent the government from proving as against them confessions made later. The right of other defendants would be solely to request and have given a proper instruction excluding the evidence from any consideration of their respective cases. It was proper to receive the evidence when offered.

Itoe v. U. S., 223 Fed. 25, 29;
Pappas v. U. S., 292 Fed. 982.

Moreover, whether requested or not the court did instruct the jury that these statements should not be considered as against any other of the defendants except the defendants making the statements (R. 262). And the court expressly stated at the time of the receipt of evidence of statements (R. 98):

> "The jury will understand that these statements are only evidence against Daniels and Rodney and not anybody that he mentions in the statement; that is all they are."

These two defendants were acquitted. In view of the direction of the court in its charge, as well as at the time of the receipt of the testimony it cannot be considered that the statements in any manner affected the case of plaintiff in error Campanelli.

VII.

THE COURT DID NOT ERR IN REFUSING THE REQUEST OF THE DEFENDANT DESIGNATED AS NUMBER XVII.

It is claimed in the Seventh Section of the brief of defendant that the court erred in refusing to give to the jury at his request a certain instruction said to relate to circumstantial evidence, and reference is made in that behalf to page 317 of the record. The instruction so referred to is upon the general proposition that in cases turning upon the circumstantial evidence, if there be two conclusions that can be reasonably drawn from facts, one favoring innocence, the jury shall adopt the milder; that as the instruction states, "there as here, the proof relied upon shall govern was purely circumstantial in its character", the result indicated should follow.

We think the answer to the contention is manifold.

(a) The instruction so quoted appears to be quoted from plaintiff's "assignment of errors". We are unable to find it set forth in the *bill* of *exceptions* or in any other part of the record. Especially, we are unable to find in the bill of exceptions, where it alone could appear properly, any statement of the

charges requested by plaintiff in error. In such case, of course, the refusal of the instruction cannot be considered.

Feigin v. U. S., 279 Fed. 107;
Walker v. U. S., 7 Fed. (2d) 309.

(b) If the instruction were proposed as set forth in the assignment it would have been improper to be given for it requires the court to state that the proof relied upon by the government in the instant case "was purely circumstantial in its character". This was not true for the government was able to produce *direct evidence* that Campanelli sat down and agreed with Henderson as to the very plan in which Campanelli was engaged in carrying out the conspiracy. This being direct testimony, the instruction requested would have required the court to state to the jury what was not the fact.

Moreover, such an instruction would have been improper to be given where the testimony is *in part direct.* The theory of the instruction is that if the government establishes all the facts claimed, yet, if a milder inference may be reasonably drawn as to the conceded facts, the jury must draw such mild inference and acquit. But here the testimony tends to prove an element of the charge directly, such fact could not be consistent with innocence, and for the court to state the principle would be to ignore the fact. Accordingly, it is generally held that this instruction upon circumstantial evidence is not adapted to cases where there is direct proof of guilt

or where the proof is in part direct and in part circumstantial.

See Monograph note on the point in *Beason v. State,* 69 L. R. A. 193, Sec. IV of note, p. 209.

(c) The trial was free from error on this point for another reason. Although the court was not required to instruct on the matter, as we have seen, yet in its charge (p. 260) it said

> "if there is any reasonable theory upon which you can reconcile the evidence consistent with the innocence of the defendants it is your duty to do so".

Other proper instructions were given by the court upon the general rule of reasonable doubt and presumption of innocence. No exceptions whatever were taken to the charge as given.

We think the assignment of error on this point is not supported by the record and, if it were, it was not well taken.

VIII.

THE COURT DID NOT ERR IN REFUSING REQUESTS WITH REFERENCE TO THE CONFESSION OF PLAINTIFF IN ERROR.

It is contended that the court erred in refusing three several requests upon the subject of the confession of the defendant, and a reference is made to page 320 of the transcript which reference quotes certain alleged requests from the "assignment of errors". The considerations referred to in the pre-

ceding section will prevent the court from considering this assignment for the reason that the charge requested by plaintiff in error is not set forth in the bill of exceptions and does not appear anywhere else in the record.

If we were to consider the requests set forth in the assignment of errors, it is apparent that they were inaccurate, and that the charge actually given by the court hereinafter referred to, was more correct. It is not true, for example, that a confession freely and voluntarily given must still be excluded, unless the party is also made fully advised of "his rights" and warned that anything he might say could later be used against him. Such formal ceremonial statements are not necessary to be shown as a condition of showing the voluntary character of the confession. In fact the presumption is that the confession was voluntary.

Gray v. U. S., 9 Fed. (2d) 337, 339.

In one of the charges so referred to, the court was asked to tell the jury that in determining whether the confession was free and voluntary, they were entitled to take into consideration—not certain other *testimony* but *the fact* that Campanelli was brought to the government agents by a government representative, etc., the court being thus asked to tell the jury that certain contentions of the defendant which the government disputed was "facts".

In any event, the law was properly covered by the court in its charge upon the subject as follows:

"If there is any reasonable theory upon which you can reconcile the evidence, consistent with the innocence of the defendants, it is your duty to do so" (R. 260).

"There was introduced during the trial numerous statements or alleged statements made by various defendants to the Government officers. These statements were made after this conspiracy, if any, was ended, and, therefore, the statements made by these individuals are not evidence against anybody except themselves; * * * But the statements made by these people, if freely and voluntarily made, are competent evidence as against themselves and should be considered by the jury as against the party making the statement. Now, in weighing the statements, you should consider the circumstances under which they were obtained; if they were not voluntarily made, or if they were made under promise of immunity, or inducement of any kind, they should be disregarded; but if they were freely and voluntarily made you should give them such weight as you think they are entitled to. And in judging them, as I said, you should take into consideration the circumstances under which they were made, the time they were made, and those that are not signed—I believe there was perhaps one that was signed, the captain's—those that were not signed, of course, depend upon the recollection of the testimony of those who testified here as to what the statements were" (R. 262-263).

CONCLUSION.

In conclusion, we show:

That the conspiracy charged as against the defendants was clearly proven as against the plaintiff in error; that there were no errors in or exceptions to the court's charge; that it does not appear that the court erred in respect to refused requests; that the receipt of the evidence challenged was proper and justified by precedents; that the defendant was shown to be an important element in an elaborate conspiracy to introduce liquor into the United States from abroad contrary to law. This conviction is just and should be upheld.

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